

**BOARD OF APPEALS CASE NO. 5256**

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**BEFORE THE**

**APPLICANTS: Duane & Adrienne Rhine**

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**ZONING HEARING EXAMINER**

**REQUEST: Variances to disturb land within  
25 feet of the 100-year floodplain and to remove  
vegetation; 1200 MacPhail Road, Bel Air**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 4/24/02 & 5/1/02**

**HEARING DATE: June 24, 2002**

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**Record: 4/26/02 & 5/3/02**

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## **ZONING HEARING EXAMINER'S DECISION**

The Applicants, Duane R. Rhine and Adrienne M. Rhine, are requesting a variance, pursuant to Section 267-11 of the Harford County Code, from the provisions of Section 267-41D(2)(c), to disturb the land less than 50 feet from the one hundred (100) year floodplain (25 feet proposed), and a variance pursuant to Section 267-41D(6) of the Harford County Code, from the provisions of Section 267-41D(5)(b), to permit the clearing or removal of natural ground cover and vegetation on the subject property in an R1 District.

The subject parcel is located at 1200 MacPhail Road, Bel Air, Maryland 21014, in the Third Election District, and is more particularly identified on Tax Map 49, Grid 3E, Parcel 227/191. The parcel contains approximately 16.653 acres more or less.

The Applicant, Duane R. Rhine, appeared and testified that he and the Co-Applicant, Adrienne M. Rhine, are the owners of the subject property. He stated that he had read the Department of Planning and Zoning Staff Report, and had no changes or corrections to the information contained therein. He also testified that he was in agreement with, and willing to abide by, all conditions suggested by the Department of Planning and Zoning in its May 29, 2002 Staff Report.

The witness described his property as a long, irregularly shaped, 16.6 acre lot. The parcel is currently unimproved. Bynum Run traverses the length of the property, which places much of the land within the Natural Resource District. There are numerous utility easements located throughout the lot. These easements are shown on the site plan which was introduced as Applicants' Exhibit No. 7.

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The Applicants are requesting two variances, so that they can build a home, barn, and garage on the northern end of the property. They are proposing to build a home with a 3,500 square foot footprint, which Mr. Rhine described as significantly smaller than other homes on comparably sized lots in the area. He also testified that it would not be possible to move the home elsewhere on the subject property, and still construct the home which he and the Co-Applicant have chosen.

Mr. Rhine testified that, in his opinion, the granting of the requested variances will not have any adverse impact on neighboring properties. He stated that he had sent a letter explaining his proposal to all adjacent property owners, and requested that they contact him with any questions or complaints. He received no responses to that letter. Several property owners from Country Club Park, a residential development which backs to the subject property, cross-examined Mr. Rhine regarding his testimony. Mr. Kenneth Merrill, who resides at 405 Glenwood Road asked for clarification of the conditions proposed by the Department of Planning and Zoning. In response to that question, the Applicants' attorney read the suggested conditions into the record. Mr. Merrill then inquired what size house the Applicants could build without obtaining a variance. The Applicant replied that they could probably build a house of approximately 2,000 square feet. In response to Mr. Merrill's follow-up question, the Applicant testified that, in his opinion, a 3,500 square foot house is more compatible with the neighborhood in which the subject property is located.

Mr. Albert Henry, who resides at 1505 Marlborough Court, questioned the Applicant as to whether his proposal would result in disturbance of any wetland areas. The Applicant replied that it would not. Mr. Henry's wife, Bernette Henry, asked the Applicant if he intended to remove the dead trees which have been piled up on the property. Mr. Rhine replied that he did. Finally, Ms. Toy M. Hanlin asked him whether a copy of a letter to adjoining property owners had been sent to Maryland Golf and Country Club. The Applicant responded that, to the best of his knowledge, it had.

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Mr. Rowan Glidden, a duly qualified landscape architect and land planner, and a vice-president with the firm Campbell & Nolan Associates, appeared and testified that he had reviewed the Application, site plan, Staff Report with attachments, and the Harford County Zoning Code. He also indicated that he was familiar with, and had personally visited the subject property. Mr. Glidden stated that his firm was retained by the Applicants to prepare the site plan for the property.

Mr. Glidden testified that, in his opinion, the subject property is unique. He described the property as a 16.5 acre parcel with 1,800 feet of frontage on MacPhail Road. The property is a long, irregularly shaped parcel, which runs north to south. The midsection of the property is approximately 400 to 425 feet wide, however, it tapers down at both ends. According to the witness, Bynum Run traverses the property from north to south, and creates a plain at the lower level. There are numerous utility easements, and sewer lines, located on the parcel. The witness indicated that the property is impacted by the one hundred (100) year floodplain, and that the eastern portion of the property contains a Natural Resource District along Bynum Run. In addition, he indicated that the property has non-tidal wetlands on the lower plain, to the south.

Mr. Glidden described the variances requested by the Applicants as follows: First, he indicated that the Applicants are not asking for approval to build within the one hundred (100) year floodplain itself, only to build within the 50 foot buffer from the floodplain. The building site is located in an area with a 10 to 11 foot vertical elevation from Bynum Run. The house would be approximately 130 feet from the one hundred (100) year floodplain. There are no proposed disturbances to any wetlands.

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The witness referred to information depicted on the Applicants' site plan, indicating that the shaded section on the eastern side of the proposed dwelling is the area for which the Natural Resource District disturbance is requested. The variance is to allow disturbance of that area during construction, if needed, because of the grade from the house to the floodplain. After construction of the home is complete, there will be mitigation to eliminate any impact to the one hundred (100) year floodplain. According to Mr. Glidden, the Applicants are also proposing to use a Super Silt Fence to prevent sediment from running into Bynum Run during construction. The runoff would flow downhill, and be filtered through a metal mesh fence, to prevent silt from contaminating the stream.

This phase of the construction will be monitored by the Department of Planning and Zoning, the Department of Public Works, and the Department of Inspection, Licensing and Permits. The witness described the permit application as a rigorous procedure in which all of the above departments would be involved.

According to Mr. Glidden, failure to grant the requested variances would cause practical difficulty to the Applicants, by prohibiting them from building the home of their choice. The footprint of the proposed home is between 3,300 and 3,500 feet. However, the home will exceed that square footage because it will be multilevel. He testified that the size of the proposed home will be consistent with the sizes of other homes in the neighborhood where the property is located.

Mr. Glidden indicated that, in his opinion, the granting of the requested variances would not cause any detriment to adjoining property owners, because the proposed home is sized appropriately for the subject parcel.

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The witness also testified that, in his opinion, the granting of the proposed variances would have no impact on Bynum Run, because the proposed location is 11 to 12 feet above the one hundred (100) year floodplain. The likelihood of any sediment contaminating Bynum Run during the construction was very small because of the silt fence which would be used during construction. He also testified that the parcel is of sufficient size to protect any property downstream.

On cross-examination, Mr. Merrill asked the witness when he last visited the subject property. Mr. Glidden responded that he had visited the property on the morning of the hearing. Mr. Merrill then questioned whether Mr. Glidden had observed that there are two walls currently being built on the property, without a silt fence being used in connection with that construction. The witness indicated that he had not observed any construction taking place at the site of the proposed home, or any fill being placed at that location. Mr. Merrill then asked if the home was going to be closer to 5,000 square feet when completed.

The witness indicated that he did not know the answer to the question. Finally, Mr. Merrill questioned whether Mr. Glidden had measured the other houses in the neighborhood to determine their compatibility with the proposed home. The witness responded that he had not.

Ms. Bernette Henry cross-examined the witness as to whether he was aware that during storms Bynum Run floods against the west wall, coming within two feet from the property line. The witness responded that he was not aware of that fact. Mr. Albert Henry cross-examined the witness as to whether the Department of Natural Resources would have jurisdiction over the property because of the proposal to disturb tidal wetlands. The witness responded that there is no proposal in place which would impact any wetlands on the property. Ms. Toy Hanlin then cross-examined the witness as to whether the property has public water and sewer. The witness responded that he did not know the answer to that question.

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At the conclusion of Mr. Glidden's testimony, the Applicant was recalled to respond to some of the questions that Mr. Glidden was unable to answer. He indicated that the proposed home will be a total of 4,500 square feet, and that the size is comparable with other homes in the area. He also indicated that the proposed home will be located on the northern portion of the property, a considerable distance away from the homes belonging to the Henrys and the Merrills. The Applicant testified that the proposed home will be serviced by a well and public sewer, and that there will be no private septic system installed on the property.

Mr. Moe Davenport, from the Department of Planning and Zoning, appeared and testified that he had reviewed the file and the Application in this case and had personally inspected the property. Mr. Davenport described the property as unique, due to its natural and geometric shape. He indicated that the majority of the property is encumbered by the one hundred (100) year floodplain, and that this restricts the size of the building envelope.

According to Mr. Davenport, Harford County Code Section 267-41D requires a 50 foot buffer from the one hundred (100) year floodplain, in order to regulate uses that may impact that floodplain.

Mr. Davenport also testified that the Department of Planning and Zoning had proposed a mitigation plan which would require the Applicants to replace, at a two to one ratio, all trees removed from the floodplain buffer area. The proposal does not call for any fill to be placed within the one hundred (100) year floodplain, and there is no proposal to clear or impact any wetlands on the property. In answer to a question asked by the Hearing Examiner, Mr. Davenport indicated that his department had solicited comments from the town of Bel Air, the Maryland Department of the Environment, and the Soil Conservation Service in connection with the subject request, and that no responses or objections were received from any of those departments.

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Mr. Davenport then stated that, in his opinion, the granting of the requested variances will not result in any adverse impact to either adjacent properties, or Bynum Run, if the proposed mitigation suggested by the Department of Planning and Zoning is required as a condition for approval.

Mr. Merrill cross-examined Mr. Davenport regarding the date of his last visit to the site. Mr. Davenport responded that he had last been present on the property approximately three weeks ago. Mr. Merrill then asked whether he had observed two walls being built within the floodplain during that visit. Mr. Davenport responded that permits had been issued for the construction of two walls, which are known as fencing walls. These walls are being constructed on the southern portion of the property, and are not located in the area for which the subject variances are being requested. Mr. Davenport also responded to several questions regarding whether fill is now being placed on the property in the area of the requested variance. He indicated that he was unaware of any fill at that location, however, that he had observed areas on the southern portion of the property which had been graded.

The witness then answered questions from Ms. Bernette Henry, regarding several trees already removed from the subject property. She inquired how the number of trees needing to be replaced would be determined. Mr. Davenport responded that all of the trees which have been removed from the property to date had fallen into, and were blocking the creek.

Mr. Lawrence Lanahan, Jr. appeared and testified in opposition to the subject Application. Mr. Lanahan's property backs up to, and runs across, Bynum Run at the southern end of the property. He indicated that Bynum Run is a large body of water which rises tremendously whenever there is a storm. According to the witness, his house is located at the top of a very high bank, and the water has occasionally risen halfway up that bank. He is concerned that any disturbance to the floodplain would result in a higher risk of flooding to his property, which is designated on the site plan as Lot 93.

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Mr. Lanahan also testified that his home is approximately 2,400 square feet, and the home next door to his is similar in size. He noted that the Applicant was not aware of what size home could be built on the subject property without the necessity for obtaining a variance. He did indicate that, in his opinion, the requested variance would cause less potential impact to his lot than to closer properties. Ms. Mary Lanahan then testified in opposition to the Applicants' request. She referred to a deep crevice running across the southern portion of the property, which she marked on the site plan with a blue line and an "X". According to the witness, she is concerned about silt building up in the stream as a result of the crevice.

Mr. Albert Henry, whose property is designated on the site plan as Lot 94, also appeared and testified in opposition to the application. He stated that he has no problem with water backing up in the area of his property, however, he has concerns that any modifications, which take place on the subject property close to Bynum Run, may create problems in the future. According to Mr. Henry, he has seen equipment get stuck in the wetlands on the southern portion of the property. He also testified that he has witnessed heavy equipment working on the southern end of the property, and stated that the ground has been dragged bare in that area.

Ms. Bernette Henry then testified in opposition to the application. She expressed concerns that there are no other 4,500 square foot homes located in the immediate area of the subject property. She indicated that she had spoken with someone at the Department of Environmental Control that morning regarding her fears about potential flooding if the requested variances are granted. According to the witness, she has seen Bynum Run overflow approximately four times in the past eight and one-half years. She stated that the stream rises approximately five to eight feet during severe storms.



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Ms. Henry expressed fears that the water will rise even higher, if vegetation is disturbed upstream from her property. She also expressed apprehension about the vegetation being removed from the southern portion of the property near the stream. Finally, the witness testified that she had received a copy of the letter which the Applicant sent to adjoining property owners, and said that the contents of that letter implied that her property value would decrease, if the Applicants were not allowed to construct a 4,500 square foot home on the subject parcel.

On cross-examination, Ms. Henry responded to questions concerning her conversation with the Department of Environmental Control. She indicated that this is a Harford County agency, and that she had spoken with a woman there by the name of Adrian Temple. In response to additional questions on cross-examination, Ms. Henry indicated that, in her opinion, the topography of the subject property will change if the requested variance is granted, and that she believes that vegetation in the one hundred (100) year floodplain buffer zone will be permanently removed as a result of this Application.

The next witness to testify in opposition to the Application was Mr. Kenneth Merrill, whose property is designated on the site plan as Parcel 96. Mr. Merrill indicated that Mr. Rhine told him when he first purchased the property that he intended to clean up the land near the stream, and that he would continue to allow members of the community access to the southern portion of the property. Mr. Rhine is now refusing to allow neighbors onto his property, however, he does allow four-wheel drive vehicles, and paint ball wars to take place there.

Mr. Merrill also testified that he has personally witnessed fill dirt being placed in the floodplain near the access road which traverses the center of the property from west to east. According to the witness, there are no measures being taken at that location to prevent silt from entering Bynum Run. He is concerned that this could cause a potential flooding problem with his septic system. Finally, Mr. Merrill indicated that he objects to the size of the house which the Applicants are proposing to construct. In his opinion, the proposed home is oversized.

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The Applicant, Mr. Duane Rhine, testified in rebuttal that, although there is soil being removed from the property on the southern portion of the parcel, the area for which the proposed variances are requested is located at the far north end of the property. The area where the soil removal is taking place has been inspected by the Department of Planning and Zoning, The Army Corps of Engineers, the Department of the Environment, and the Department of Public Works.

These agencies are assisting him with alleviating problems caused by runoff from Glenwood Road, and from the private road which traverses the property from west to east. According to the witness, the Department of the Environment suggested that he install fill, and then seed and straw that portion of the property to help stabilize the soil. This action was necessitated by the fact that the existing crevice has flooded his main pasture on numerous occasions. Pursuant to suggestions made by the Army Corps of Engineers, he has also cleared dead and rotted trees from the stream. He acknowledged that there is dead wood stacked in the area as a result of this clearing, and indicated that he does intend to remove the wood from the property.

The witness stated that all of the work currently being done on the southern portion of the property has been completed pursuant to valid permits. None of the public agencies involved required that any silt filters be installed during the pendency of that work. He also testified that the walls which have been constructed are stone gates, built to close a gap in the fence on the southern portion of his property.

Mr. Rhine then referred to the area designated on the site plan as the existing crevice. He testified that this crevice, which is now five feet deep, was created as a result of development which took place above the property. Storm water runoff empties onto his property near the crevice, as it flows toward Bynum Run. The Department of Public Works has agreed to fix the existing problem sometime in the fall of 2002, by channeling the water directly into Bynum Run.

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Mr. Rowan Glidden testified in rebuttal regarding Ms. Henry's concerns that the granting of the subject variances would put her property in jeopardy by creating elevated water levels in Bynum Run. He stated that the area of the property for which the variances have been requested is approximately 203 to 204 feet above sea level. The home which the Applicants are proposing to build will be between 210 and 212 feet above sea level.

He also testified that the Applicants' home and barn will be located entirely outside of the one hundred (100) year floodplain. A small portion of the house and garage would be located within the 50 foot buffer from the one hundred (100) year floodplain. There is no request to place fill within the floodplain itself. According to the witness, there would be no impact to Ms. Henry's property, because any vegetation removed during construction will be replaced at a two to one ratio after the construction is complete. In addition, any impact caused by the minor disturbance in the floodplain buffer would be so minimal as to affect only a small portion of the subject property itself.

### **CONCLUSION:**

The Applicants, Duane R. Rhine and Adrienne M. Rhine, are requesting a variance pursuant to Section 267-11 of the Harford County Code, from the provisions of Section 267-41D(2)(c), to disturb the land less than 50 feet from the one hundred (100) year floodplain (25 feet proposed), and a variance proposed pursuant to Section 267-41D(6) of the Harford County Code from the provisions of Section 267-41D(5)(b) to permit the clearing or removal of natural ground cover and vegetation on the subject property in an R1 District.

Section 267-41(D)(2)(c) reads as follows:

"Application. The Natural Resources District shall apply to the following environmental features:

- (c) Streams: the following streams, including Broad Creek, Bynum Run, Carsins Run, Deer Creek, Grays Run, Ahha Branch, Herring Run, Little Gunpowder Falls, Rock Run, Peddler Run, Swan Creek, Winters Run and their tributaries, as identified on the Harford County Hydrology Map (1976

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Revised Maryland Geological Survey Base Map 1:62,500). Tributaries to the above streams which drain a subbasin of more than four hundred (400) acres are included in the Natural Resources District stream designation. The acreage of a subbasin is determined at the point of confluence with another stream identified on the County Hydrological Map. The Natural Resources District area for stream protection shall be a minimum distance of one hundred fifty (150) feet on both sides of the center line of the stream or fifty (50) feet beyond the one-hundred-year floodplain, whichever is greater, and along their tributaries for a minimum of seventy-five (75) feet on both sides of the center line of the tributary. The Natural Resources District boundaries under this provision shall include the buffer requirements of Subsection D(4)(b) and (5)(b) of this section.”

Section 267-41(D)(5)(b) provides:

“Conservation requirements. The following conservation measures are required within this district:

- (b) Clearing or removal of natural ground cover and vegetation in preparation for development shall be minimized. Site development shall be clustered or designed in such a manner to preserve large contiguous tracts of woodland. Clearing of woodlands shall not reduce the area coverage of trees below seventy percent (70%). Along streams, a buffer with minimum width of fifty (50) feet, plus four (4) feet for each one-percent increase in slope, measured from the water's edge, shall be provided. Trees within the buffer may be harvested to remove diseased, insect-damaged or fire-damaged trees to salvage the same or reduce potential stream blockage due to fallen timber. Essential access roads may be permitted to traverse the buffer.”

Section 267-41D(6) of the Harford County Code, which permits variances from the requirement set forth in Subsection D(3), (4) or (5), states as follows:

“Variances. The Board may grant a variance to Subsection D(3), (4) or (5) of the Natural Resources District regulations upon a finding by the Board that the proposed development will not adversely affect the Natural Resources District. Prior to rendering approval, the Board shall request advisory comments from the Zoning Administrator, the Soil Conservation Service, and the Department of Natural Resources.”

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Section 267-11 of The Harford County Code permits the granting of variances, stating that:

“Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest.”

The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of Cromwell v. Ward, 102 Md. App. 691, (1995). This two-prong test can be summarized as follows. First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique only if there is a finding that a peculiar characteristic or unusual circumstance, relating only to the subject property, causes the zoning ordinance to impact more severely on that property than on surrounding properties. Cromwell, supra, at 721. If the property in question is unique, the trier of fact may proceed to the second prong of the test. The second prong involves a determination of whether literal enforcement of the zoning ordinance, with regard to the unique property, would result in practical difficulty or unreasonable hardship to the property owner.

The Hearing Examiner finds that the subject property is unique. The property is a long irregularly shaped parcel. Bynum Run traverses the length of the property, placing a substantial portion of the lot within in the Natural Resource District. There are utility easements, and sewer lines, located throughout the property. There was no opposition testimony introduced to contradict any of these findings. Thus, the first prong of the Cromwell test has been met.

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The Hearing Examiner also finds that literal enforcement of the Code in this case would result in both practical difficulty and unreasonable hardship for the Applicants. The majority of the property is encumbered by the one hundred (100) year floodplain. The proposed location, which is naturally elevated above the floodplain, is the only place on the property which could accommodate a dwelling without significantly impacting natural resources. If the requested variances are not granted, the Applicants will be unable to construct the home of their choice on their property, and will therefore be denied property rights commonly enjoyed by others in the area. Other property owners within Harford County have greater flexibility in the construction of dwellings on similarly sized lots.

The Hearing Examiner further finds that the granting of the requested variance will not have any adverse impact on, or be substantially detrimental to, adjacent properties, if the Department of Planning and Zoning recommendations are implemented. No request has been made to disturb wetlands, or to build in, or place any fill within, the 100 year floodplain itself. The only DNR property which would be disturbed is a small area located within the 50 foot buffer to the floodplain. The Department of Planning and Zoning has proposed a mitigation plan which would require the Applicants to replace all trees removed from the buffer area at a 2 to 1 ratio. In addition, the subject parcel itself is of sufficient size to protect properties located downstream from the area of the requested variance.

The proposed home will be located on the northern end of a long, narrow, 16.5 acre parcel. All of the Protestants who testified in opposition to the application own property which backs to the southern end of the property. Several of the Protestants expressed concern about the size of the home which the Applicants propose to construct, stating that their homes, and other homes within Country Club Estates, are much smaller than the one which the Applicants wish to build. However, as shown on the site plan, all of the Protestants live on lots which are much smaller than the subject property. The Hearing Examiner accepts the testimony of the Applicant, and Mr. Glidden that the proposed home is sized appropriately for the subject parcel.

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Finally, the Hearing Examiner finds that the proposed development will not cause any adverse impact to either Bynum Run, or the Natural Resources District, because the home will be located on a knoll, which is naturally elevated approximately 11 to 12 feet above the floodplain. The Applicant will be required to take substantial precautions to prevent adverse impact to Bynum Run during construction. A Super Silt Fence will be utilized to prevent sediment from running into the stream, and the construction will be monitored by The Department of Planning and Zoning, the Department of Public Works, and the Department of Inspection, Licensing and Permits.

The Hearing Examiner recommends approval of the Applicants' request, subject to the following conditions:

1. The Applicants shall submit a mitigation plan that delineates the size and location of existing trees in the vicinity of the proposed disturbance and the stream. The plan must identify which trees will be removed and which trees will be saved. At least two trees, with a minimum size of 1-1/2 (one and one-half) inch caliper, must be planted between the area of disturbance and the stream for every tree over 8 inches in diameter that will be removed. The plan must also show the grading and landscaping around the proposed dwelling. The Department of Planning and Zoning must approve the mitigation plan prior to the issuance of the building permit.
2. No fill shall be placed in the one hundred (100) year floodplain.
3. All areas of forested non-tidal wetlands shall be maintained in a natural state and shall not be cleared of its under story trees and shrubs, with the exception of exotic or invasive species.

Date JULY 26, 2002

Rebecca A. Bryant  
Zoning Hearing Examiner